SUPREME COURT, U. S.

FILED

MAR 11 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 1145

THOMAS F. GORDON,

Petitioner,

v.

THE BROOKLYN BAR ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

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Petitioner prays that a writ of certiorari issue to review the order of the Appellate Division, Second Department, of the Supreme Court of the State of New York entered on July 1, 1968, suspending petitioner from the practice of law for a period of one year.

OPINION BELOW

The opinion of the court below is reported at 30 A.D.2d 807, 292 N.Y.S.2d 817.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The order of the Appellate Division was entered on July 1, 1968. A motion for reargument was denied by the Appellate Division on August 21, 1968. Petitioner's motion for leave to appeal was denied and his appeal was dismissed by the Court of Appeals of the State of New York on November 13, 1968. A motion for reargument of the motion for leave to appeal and to amend or vacate the order dismissing the appeal taken as of right was denied by the Court of Appeals on December 11, 1968.

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination, as applied to state action through the Fourteenth Amendment, precludes an attorney's failure to provide information to the Grievance Committee of a bar association in its investigation of complaints against him from being made the basis of disciplinary charges against the attorney.

2. Whether the Fifth Amendment privilege against self-incrimination, as applied to state action through the Fourteenth Amendment, precludes adverse factual inferences to be drawn from an attorney's failure to testify in disciplinary proceedings against him.

3. Whether the due process clause of the Fourteenth Amendment is violated by basing charges in a disciplinary proceeding on matters which had previously been considered and dismissed by the grievance committee of the bar association, "an arm of the Appellate Division," and by imposing a sanction destructive of an attorney's practice on the basis of conduct which involved no intentional wrongdoing and resulted in no injury to any client.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment V:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

The United States Constitution, Amendment XIV:

> Section 1 * * * nor shall any state deprive any person of life, liberty or property without due process of law;

STATEMENT OF CASE

Petitioner was admitted to practice as an attorney and counsellor at law in the State of New York on December 20, 1950. The Brooklyn Bar Association, respondent, instituted a disciplinary proceeding against petitioner in the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, by filing its petition verified November 8, 1967. The issues raised by the petitioner's answer were referred for hearing and report to a Justice of the Supreme Court as a referee. After the Justice filed his report dated May 6, 1968, the Appellate Division on respondent's motion ordered petitioner suspended from the practice of law for a period of one year.

The Bar Association's petition contained 25 numbered allegations relating to petitioner's handling of personal injury claims with respect to which he was retained by four clients. Four paragraphs of the petition contained allegations to the effect that petitioner failed to respond to requests of respondent's Committee on Grievances for information concerning complaints it had received with respect to petitioner. (Pet. pars. 8, 9, 15, 20.) The petition also contained allegations concerning admissions made by petitioner at hearings held on the complaints before the Bar Association's Committee on Grievances. (Pet. pars. 10, 22.) Petitioner admitted these allegations.

At the inception of the hearing before the referee, petitioner raised objections to the charges based on his failure to furnish information to the Committee on Grievances

relying upon his constitutional right to remain silent without penalty under the Fifth Amendment (Transcript of Minutes, pp. 4-6). He also objected on constitutional grounds under the Fifth Amendment to the charges based upon admissions made under compulsion at hearings before the grievance committee (Tr. 6-9).

With respect to two complaints (Ahearn and Paradiso), involving claims for personal injuries, the referee found that petitioner was neglectful in that he permitted the claims to become barred by the statute of limitations and failed to advise the clients of the actual status of the matters by making elusive and untrue answers upon inquiries (Referee's Report, p. 7). He further found, however, that petitioner personally settled these matters with the clients by paying Ahearn $1,000 and Paradiso $2,000 (Report, p. 7). Both of these complaints had been the subject of prior hearings by the grievance committee of the Bar Association and had been previously adjudicated. On June 19, 1962, after having received a letter from Ahearn that he wished to withdraw his complaint since petitioner had "satisfactorily concluded the matter," the Bar Association's Committee on Grievances voted to dismiss the complaint (Pet. pp. 3-4). At its meeting on April 19, 1967, the Bar Association's Committee on Grievances similarly voted to dismiss Paradiso's complaint (Pet. p. 5).

With respect to the third and fourth complaints (Kennedy and Lanzilotta), which involved infants' claims for personal injuries, the referee found that petitioner was neglectful in failing to prosecute the claims diligently and in failing properly to advise the clients with respect to the status of their claims (Report, p. 8). No loss was suffered in either case, however. In the *Kennedy* matter, petitioner, who was requested by the client to continue as his attorney, eventually filed a complaint and an offer of settlement has been received (Report, p. 8).[1] In the *Lanzilotta* matter, the

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[1] This claim has since been satisfactorily settled.

summons and complaint were served within less than a year after the accident occurred. The client moved to Florida in the year in which the complaint was filed and the referee found that the client's failure to make inquiry for substantial periods of time contributed in some measure to petitioner's neglect in the prosecution of the claim (Report, p. 8). The litigation, however, remained alive and another attorney has been substituted for its further prosecution.

The referee's report to the Appellate Division, after summarizing the pleadings and reviewing the testimony, immediately before the statement of his findings, included the following paragraph:

"Respondent [petitioner] did not testify at the hearing."

The Appellate Division confirmed the report of the referee with respect to the four charges, but disaffirmed the further finding in connection with the fourth charge that the client's moving to Florida and failing to make inquiry for substantial periods of time contributed to the delay in the prosecution of the claim. The decision of the Appellate Division dated July 1, 1968, contained the statement with respect to the findings of the referee that "these findings were established by the admissions in respondent's [petitioner's] answer to the petition". The decision of the Appellate Division thus relied in part upon petitioner's admissions with respect to the allegations in the petition that he failed to furnish information to the Committee on Grievances. By its order of July 1, 1968, the Appellate Division ordered that petitioner be suspended from the practice of law for a period of one year, commencing July 20, 1968.

In his motion, by order to show cause signed July 16, 1968, for leave to reargue confirmation of the referee's report and to vacate the Appellate Division's order of July 1, 1968, which was denied on August 21, 1968, and supporting brief petitioner again raised the issue that inclusion in the charges of his failure to respond to requests of the bar association's Committee on Grievances violated his constitutional right to remain silent. The privilege was asserted

with respect to both the allegations based upon his failure to supply information to the Committee on Grievances and to the coerced admissions made before the Committee. Petitioner also argued in his brief inclusion in the charges against him of the two complaints which had previously been dismissed by the Committee on Grievances was a denial of due process of law.

Petitioner's motion for leave to appeal to the Court of Appeals raised the question that his constitutional rights under the Fifth and Fourteenth Amendment of the Constitution of the United States were violated, that the penalty imposed was excessive and unwarranted under all of the facts and circumstances of the case and vague and indefinite and in violation of due process of law. In his brief, petitioner argued that he had been penalized in violation of his constitutional right to remain silent, that revival of the two complaints previously dismissed was a denial of due process, that the penalty imposed "continuing until the further order of the court" was violative of due process as vague and uncertain, and that the punishment inflicted was out of proportion to the misconduct charged (Brief, pp. 7, 15-17). On November 13, 1968, the Court of Appeals denied petitioner's motion for leave to appeal and dismissed the appeals taken as of right upon the ground that no substantial constitutional question was presented. Petitioner's motion for reargument of the denial of his motion for leave to appeal and the dismissal of his appeal or, in the alternative, for amendment of the remittitur raised the question of a denial of due process under the Fifth and Fourteenth Amendments on the grounds, among others, that petitioner was accused of misconduct for his failure to respond to inquiries of the Committee on Grievances, that two of the charges had been previously adjudicated, and that the penalty imposed was vague, and indefinite, and out of proportion to the seriousness of the misconduct charge. The Court of Appeals denied this motion in all respects on December 11, 1968. Both courts below failed to pass upon the constitutional issues raised by petitioner.

The suspension order has been stayed both in the Appellate Division and during the pendency of the proceedings in the Court of Appeals. After final denial of leave to appeal and dismissal of the appeal in the Court of Appeals, respondent requested the Appellate Division by motion to fix a new date for the suspension to commence. Respondent's motion to fix a new date has been denied by the Appellate Division and a new date has not yet been fixed. Suspended attorneys are required to notify all clients and adversary attorneys by registered or certified mail of the fact of their suspension and inability to act as an attorney.

REASONS FOR GRANTING THE WRIT

Petitioner submits that the proceedings below violated rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the Federal Constitution in three respects: (1) The attachment of adverse consequences in the disciplinary proceeding to petitioner's decision to remain silent violates the Fifth Amendment privilege against self-incrimination. (2) The use in the disciplinary proceeding of admissions made by petitioner under the threat of disbarment constitutes a violation of the Fourth and Fifth Amendments. (3) Predicating disciplinary action on charges previously dismissed by the Committee on Grievances of the bar association and imposing a punishment virtually destructive of an attorney's practice constitutes a denial of due process of law guaranteed by the Fourteenth Amendment.

1. It has been shown that the Bar Association's petition which initiated the instant disciplinary proceeding contained numerous allegations of petitioner's failure to provide information requested in connection with complaints received by its Committee on Grievances. Petitioner's failure to deny these allegations and the Appellate Division's reliance in its decision upon petitioner's admissions indicate that they constituted part of the case made against petitioner in the disciplinary proceeding. We have also adverted to the referee's emphatic notation in his report to the Appellate

Division of petitioner's failure to testify at the hearing. The Appellate Division's decision nowhere suggests that it gave no weight to this factor. The decisions of the New York courts make clear that they regard with disfavor an attorney's failure to cooperate by furnishing inculpatory information to an investigating committee (*Cohen v. Hurley*, 366 U.S. 117; *Spevak v. Klein*, 16 N.Y.2d 1048, 213 N.E.2d 457; *Matter of Sultan*, 26 A.D.2d 210, 271 N.Y.S.2d 1000; *Matter of Edelman*, 16 A.D.2d 521, 229 N.Y.S.2d 844) and will draw adverse inferences from his failure to testify in his own disciplinary proceeding (*Matter of Kaye*, 24 A.D.2d 345, 266 N.Y.S.2d 69; *Matter of Wysell*, 10 A.D.2d 199, 202, 198 N.Y.S.2d 456; *Matter of Association of the Bar of the City of N.Y. v. Randel*, 258 N.Y. 216, 219, 221, 52 N.E. 1106).

The attachment of adverse consequences to petitioner's failure to provide incriminating information to the Committee on Grievances and his failure to testify before the referee imposed an impermissible penalty on the exercise of the privilege against self-incrimination. In *Malloy v. Hogan*, 378 U.S. 1, 8, the Court made clear that application of the Fifth Amendment standards to the Fourteenth Amendment precluded the States from penalizing the exercise of "the right of a person to remain silent." Thus, the Court held in *Griffin v. California*, 380 U.S. 609, 614, that adverse comment by a court or prosecutor upon the refusal to testify is repugnant to the Fifth Amendment, since "[i]t is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Basing charges in a disciplinary proceeding on failure to supply information and drawing an adverse conclusion from petitioner's failure to testify are patently greater penalties than the adverse comments to the jury condemned in *Griffin v. California*.

The application of these principles in disciplinary proceedings involving attorneys was made clear by this Court's decisions in *Spevack v. Klein*, 385 U.S. 511; *Kaye v. Co-*

ordinating Committee, 386 U.S. 17, and *Zuckerman v. Greason*, 386 U.S. 15. In *Spevack v. Klein*, which expressly overruled *Cohen v. Hurley*, 366 U.S. 117, the Court expressly held that the privilege against self-incrimination was available to attorneys and that disbarment was a punishment not to be imposed upon an attorney for invoking the privilege and refusing to testify in an investigation of the attorney's conduct. *Kaye v. Co-ordinating Committee*, involved, among other things, the penalty of an adverse presumption against the attorney in a disciplinary proceeding because of his failure to testify. The Court wrote no opinion but vacated the disbarment order and remanded the case for reconsideration in light of *Spevack v. Klein*. It appears, therefore, that petitioner's privilege against self-incrimination under the Fifth and Fourteenth Amendments was infringed when his failure to provide information and to testify had adverse effects in the disciplinary proceeding.

2. The use in the disciplinary proceeding of admissions made by petitioner to the Committee on Grievances under the implied threat of disbarment (*Cohen v. Hurley*, 366 U.S. 177) also constituted a violation of his Fifth Amendment privilege as well as the guarantee against unreasonable searches and seizures of the Fourth Amendment. Petitioner's admissions before the Committee on Grievances were alleged in the petition filed by the bar association in the disciplinary proceeding and not denied by petitioner. They were relied upon by the referee and the Appellate Division in the adverse findings made with respect to the petitioner.

A. *Spevack v. Klein*, 385 U.S. 511, established that an attorney may not be disbarred for his refusal in reliance on the privilege against self-incrimination to furnish records and information relating to his law practice. See also *Uniformed Sanitation Men v. Commission of Sanitation*, 392 U.S. 280; *Gardner v. Broderick*, 392 U.S. 273. Petitioner, under threat of disbarment for failure to do so (*Cohen v. Hurley*, 366 U.S. 177), complied with a request by the Committee on Grievances for information. The evidence

compelled by threat of disbarment was used in the subsequent disciplinary proceedings against him which resulted in the suspension order of July 1, 1968. Clearly, this compelled testimony could not have been used against petitioner in a criminal prosecution (*Garrity v. New Jersey*, 385 U.S. 493) or in a proceeding for forfeiture of his property. *Boyd v. United States*, 116 U.S. 616. The New York Court of Appeals has recently held that attorneys "had no privilege against making disclosures usable only in a disciplinary proceeding. The Constitutional privilege applies only in the case of evidence which might be used against them in a criminal case under the language of the Fifth Amendment." *Zuckerman v. Greason*, 20 N.Y.2d 430, 438, 285 N.Y.S.2d 1, 6 (1967). Obviously, this holding determined the Appellate Division's and the Court of Appeals' rejection of petitioner's claim of a violation of his rights under the Fifth and Fourteenth Amendments.

The result in the present case assumes that evidence coerced by threat of disbarment may be used against an attorney in a disciplinary proceeding. But whether evidence so coerced may thus be used is a question of substance under the Fifth Amendment which has not heretofore been determined by this Court and deserves the Court's consideration because the decision below appears inconsistent with the decisions of this Court that the forfeiture of property is a criminal case under the Fifth Amendment (*Boyd v. United Stated, supra*) and that denial of the right to practice law is punishment under the bill of attainder prohibitions of the Constitution. *Ex Parte Garland*, 4 Wall. 333, 377. Also involved is the closely related question whether the coercive nature of the Committee on Grievances' demand (*Boyd v. United States, supra*) constituted an unreasonable search under the Fourth Amendment which brough into play the exclusionary rule held applicable to the State in *Mapp v. Ohio*, 367 U.S. 643.

Petitioner's claim of a violation of the privilege against self-incrimination rests on the contention that the suspension

of an attorney from the practice of law is within the protection of the privilege because it is the equivalent of a criminal penalty and that the use in the disciplinary proceeding of incriminating evidence compelled by threat of disbarment constituted an invasion of the privilege. The holding that the use of coerced testimony did not violate petitioner's constitutional rights is presumably based upon the rationale that a disciplinary proceeding is not a "criminal case" within the meaning of the privilege against self-incrimination. *Zukerman v. Greason*, 20 N.Y.2d 430; 285 N.Y.S.2d 1 (1967); *In re Ungar*, 27 A.D.2d 925, 282 N.Y.S.2d 158 (1st Dept., 1967).

If suspension from the bar is a criminal penalty, however, the Fifth Amendment precludes the use of coerced testimony in the disciplinary proceeding. The compulsion of incriminating testimony generates an immunity from sanctions which are "criminal in nature" (*Ullmann v. United States*, 350 U.S. 422, 431) whether or not the immunity is contemplated when the testimony is compelled. *Garrity v. New Jersey*, 385 U.S. 493. Consequently, compelling petitioner to testify under threat of disbarment barred the use of this testimony in any proceeding which might result in the imposition of a penalty of a criminal nature. The use of compelled testimony in the present case, therefore, squarely poses the question whether a disciplinary proceeding is a "criminal case" within the meaning of the Fifth Amendment's prohibition against compelled, self-incriminating testimony.

There is formidable authority in the decisions of this Court for the view that, for self-incrimination purposes, a disciplinary proceeding is criminal in nature. *Boyd v. United States*, 116 U.S. 616; *Lees v. United States*, 150 U.S. 476; cf. *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 701. Certainly, the loss of one's right to practice his profession, whether temporary or permanent, is no less a criminal penalty than the forfeiture of property involved in the *Boyd* case. The continued vitality of the *Boyd* case was

underscored by the reaffirmation in *Spevack v. Klein* "of the broad protection given the privilege" in *Boyd v. United States, supra.* In *Boyd* "compulsory production of books and papers of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself" (385 U.S. at 515). The *Lees* and *Plymouth Sedan* cases also involved property forfeitures. The dissenting opinions in *Cohen v. Hurley*, 366 U.S. 117, overruled in *Spevack v. Klein*, 385 U.S. 511, expounded the views that the effects of disbarment were so severe as to entitle a lawyer to "the full benefit of the 'law of the land' " (366 U.S. at 147) and that "taking away a man's right to practice law is imposing a penalty as severe as a criminal sanction" (366 U.S. at 153-154). Although disbarment has a more severe effect on the attorney involved than suspension, suspension is more clearly imposed as punishment. The purpose of disbarment may be to protect the public from an unfit practitioner. Suspension for a one-year period, however, acknowledges that the attorney is not unfit to practice law by recognizing him as a suitable practitioner after expiration of the suspension period. The suspension is obviously punishment for misconduct.

Denial of the right to engage in the practice of law or in other occupations has been held similar to a criminal penalty for the purpose of other constitutional provisions. An attorney has been held "entitled to procedural due process, which includes fair notice of the charge" in disciplinary proceedings because they "are proceedings of a quasi-criminal nature" and disqualification from practice "is a punishment or penalty imposed on the lawyer." *In Re Ruffalo*, 390 U.S. 544. Disqualification from the practice of law, as well as the pursuit of other vacations, has been regarded as punishment for the purposes of the Constitution's bill of attainder and ex post facto prohibitions. *Ex Parte Garland*, 4 Wall. 333, 377 (Legislative denial of an attorney's right to practice "for past conduct can be regarded in no other light than as punishment for such conduct"); *Cummings v. Missouri*, 4 Wall. 277, 327 ("This deprivation [of right to

pursue regular avocations] is punishment"); *United States v. Lovett*, 328 U.S. 303, 316 ("Permanent proscription from any opportunity to serve the Government is punishment"); *United States v. Brown*, 381 U.S. 437 (Disqualification from holding union office held punishment). Since disqualification from practicing law has been regarded as a criminal penalty for the purpose of other constitutional safeguards, it should similarly be regarded as criminal punishment for purposes of the privilege against self-incrimination. The question whether disciplinary action against attorneys is within the protection of the privilege, therefore, warrants review by this Court.

The importance of determining whether a disciplinary proceeding is a criminal case for purposes of the privilege is accentuated by the interpretation by some members of the Court of the recent decisions in *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280, and *Gardner v. Broderick*, 392 U.S. 273, that attorneys may be compelled, absent the possibility of criminal prosecution, to provide information that may lead to their disqualification from practice. The opinion of the Court by Mr. Justice Fortas in the *Gardner* case (p. 278) acknowledged that if "a policeman had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey*, *supra*, the privilege against self-incrimination would not have been a bar to his dismissal." Mr. Justice Harlan apparently derives from this the conclusion that an attorney, similarly, may be disbarred, notwithstanding the decision in *Spevack v. Klein*, *supra*, for refusing to answer questions concerning the practice of his profession. In a concurring opinion, joined by Mr. Justice Stewart, he finds in the *Gardner* and *Uniformed Sanitation* cases "a procedural formula whereby" lawyers may be "disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices" (392 U.S. at 285).

Obviously, if lawyers may be punished for refusing to disclose information that may lead to disciplinary action, such punishment is not within the protection of the privilege. Mr. Justice Fortas, however, expressly differentiated the situation of a public official from that of a lawyer, thereby suggesting that, even absent the possibility of criminal prosecution, the lawyer may not be disciplined for refusing to provide information concerning his law practice presumably because disciplinary proceedings are within the scope of the privilege. The desirability of a dispositive decision of this Court to resolve any doubt on the important constitutional question whether the privilege applies to the penalty of disqualification from the practice of law seems apparent.

B. The compulsory production of petitioner's testimony under an unconstitutional threat of disbarment constituted an illegal search and seizure under the Fourth Amendment.[2] *Spevack v. Klein, supra,* decided that a lawyer cannot be disbarred because of his refusal to testify at a disciplinary investigation in reliance on the privilege against self-incrimination. Petitioner, however, under threat of disbarment in violation of his constitutional rights, was compelled to forego the privilege and supply inculpatory information. The fruits of this unconstitutional compulsion were utilized in the proceeding which led to his suspension. *Boyd v. United States, supra,* held that "a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment" (116 U.S. at 622). Coerced production for disciplinary purposes would appear similarly to be within its scope.

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[2]Petitioner did not raise a Fourth Amendment question in the proceedings below. Because of the close connection between the concepts embodied in the Fourth and Fifth Amendments (*Boyd v. United States, supra; Mapp v. Ohio, supra*), however, the court may wish to consider petitioner's constitutional claim in terms of the Fourth, as well as the Fifth, Amendment.

The exclusionary rule with respect to evidence obtained by an unreasonable search was held applicable to state proceedings in *Mapp v. Ohio*, 367 U.S. 643. The Fourth Amendment has been held applicable to administrative investigations (see, e.g. *See v. City of Seattle*, 387 U.S. 541), and the policy of the exclusionary rule to discourage violation of the constitutional protection would seem to preclude the State's use of evidence obtained in violation of the Fourth Amendment in a civil or quasi-criminal, as well as a criminal, proceeding. See *Mapp v. Ohio, supra; Elkins v. United States*, 364 U.S. 206. Evidence tainted by an unreasonable search has been held by a Court of Appeals inadmissible in an administrative proceeding which resulted in a cease and desist order. *Knoll Associates, Inc. v. Federal Trade Commission*, 397 F. 2d 530 (C.A. 7, 1968). The same policy should preclude use in disciplinary proceedings of the product of the unconstitutional invasion to the detriment of the person whose constitutional privilege was violated. The present case thus presents a question of important constitutional dimensions under the Fourth, as well as the Fifth Amendment.

3. Whether or not the self-incrimination and unlawful search and seizure prohibitions of the Fourth and Fifth Amendments have been violated, the proceedings which culminated in the suspension order departed so radically from concepts of fundamental fairness as to constitute a violation of the more generalized due process clause of the Fourteenth Amendment.

The one-year suspension imposed upon petitioner was based upon findings that he had been neglectful in handling four matters in which he had been retained and that he had been less than frank in disclosing the status of some of these matters upon inquiry. Two of the matters have been the subject of earlier consideration by the Committee on Grievances, one in 1962 and the other in 1966. They had been satisfactorily settled by petitioner with the clients by payment of the value of their claim and had been dismissed by

the Committee on Grievances. The remaining two matters resulted in no pecuniary loss to the clients. In one, after being apprised of all the facts, the client requested petitioner to continue as his attorney in the case which has now been settled to the satisfaction of the client. In the other, a new attorney has been substituted.

With respect to the dismissed charges, it is inherently inequitable to base new charges on matters which have been already heard and adjudicated, particularly since the prior adjudication by the Committee on Grievances is regarded in New York as the conclusion of a "judicial proceeding". In *Wiener v. Weintraub*, 22 N.Y. 2d 330, 292 N.Y. Supp. 2d 667 (1968), the New York Court of Appeals held:

> Petitions or complaints charging professional misconduct of an attorney which, in the past, were presented to the General Term of the Supreme Court (see *Youmans v. Smith*, 153 N.Y. 214, 215, *supra*) are now usually filed with the Grievance Committee of a Bar association. * * * And it has been observed a proceeding before such a committee constitutes a "judicial proceeding" (*Doe v. Rosenberry*, 255 F.2d 118, 120). *In the investigation of such complaints and in the conduct of such proceeding then the Bar association's Grievance Committee acts as a quasi-judicial body and as such, is an arm of the Appellate Division. Quite clearly, the filing of the complaint in the present case initiated a judicial proceeding.* (Emphasis supplied.)

Elementary fairness, resting on double jeopardy concepts embodied in our fundamental law, would seem to preclude matters which have already been adjudicated by "an arm of the Appellate Division" from being the subject of subsequent disciplinary proceedings by the Appellate Division.

In any event, whether the severity of the one-year suspension be evaluated as a punishment for the four complaints or the two complaints not previously adjudicated, it is unnecessarily harsh and, for that reason, not reasonably related to an appropriate state interest in the regula-

tion of the practice of law. This conclusion is urged in light of the fact there was no deliberate wrongdoing and no one suffered any loss. The order of suspension requires petitioner to notify promptly by registered or certified mail all clients being represented in pending matters and attorneys for adverse parties of his suspension and consequent inability to act as an attorney after the effective date of the suspension order. Furthermore, reinstatement is not automatic after the one year suspension but continues "until the further order of this Court, with leave to apply for reinstatement after the expiration of said period of one year". It is thus clear that the suspension itself will extend for considerably more than a year. Moreover, it should be recognized, as a practical matter, that the suspension of an attorney engaged in a negligence practice, in which because of court calendar delays it takes years to develop the necessary backlog of cases to provide current income, is virtually destructive of the attorney's practice.

This severe punishment in the circumstances of this case constitutes a denial of due process. Although all-encompassing standards of due process under the Fourteenth Amendment have not been precisely defined, conduct which is unduly offensive to the sense of fairness inherent in our traditional concepts of liberty and respect for individual rights or which shocks the common understanding of decency and fair play does not satisfy its requirements. The standards of due process in a disciplinary proceeding approach those applied in cases of a criminal nature. *In re Ruffalo, supra.* Measured against these standards the instant disciplinary proceeding violated the fundamental fairness standard of the due process clause of the Fourteenth Amendment. Cf. *Rochin v. California,* 312 U.S. 165; *Rogers v. Richmond,* 365 U.S. 534; *Raley v. Ohio,* 360 U.S. 423.

The extreme penalty imposed upon petitioner is not reasonably related to the State's proper interest in regulating membership in the bar. The State cannot deny a person

membership in the Bar for reasons that do not have a rational connection to their fitness or capacity as practitioners. *Schware v. Board of Bar Examiners,* 353 U.S. 232. "There is no showing of 'overriding and compelling state interest' (*Gibson v. Florida State Legislative Comm.*, 372 U.S. 539, 546) that would warrant intrusion" (*DeGregory v. New Hampshire Atty. Gen.*, 383 U.S. 825, 829) into petitioner's constitutionally protected right to remain a member of the bar. Cf. *Schware v. Board of Bar Examiners, supra; Willner v. Committee on Character,* 373 U.S. 96. The "requisite rational relation" between the severe punishment of destruction of petitioner's law practice and the proper objects of regulation of the practice of law is entirely absent. Cf. concurring opinion in *Trop v. Dulles,* 356 U.S. 86, 114.

This Court has taken notice on numerous occasions of the extreme severity of the punishment of disqualification from practice and of the humiliation and disgrace which accompany it. "A removal from the Bar should, therefore, never be decreed where any punishment less servere * * * would accomplish the end desired." *Bradley v. Fisher,* 13 Wall. at 355. The harsh sanction against petitioner weighs so disproportionately against the charges sustained as to constitute a violation of substantive due process.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON LIFTIN
1819 H Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

APPENDIX

OPINION OF APPELLATE DIVISION, JULY 1, 1968

In this proceeding to discipline an attorney for professional misconduct, petitioner moves (1) to confirm in part and to disaffirm in part the report of the Justice of the Supreme Court to whom this court referred the issues for hearing and report and (2) for further action with respect to respondent as contemplated by law. Respondent was admitted to the Bar by this court on December 20, 1950.

The proceeding involves four charges against respondent, set forth in the petition, each based on a complaint by or on behalf of a separate client with respect to respondent's conduct in the handling of the client's claim for injuries sustained. As to the first two charges the findings in the report are that respondent was neglectful in that he failed to prosecute the clients' claims, permitting the claims to become barred by the Statute of Limitations; failed to advise the clients of the true status of the claims; and made general, elusive and untrue responses to the clients' inquiries; but personally made payment to the clients in settlement.

The injured claimant in the third charge was an infant and the findings are that respondent was neglectful in that he failed to respond to repeated inquiries by the child's father (who had retained respondent) as to the status of the claim; and failed to prosecute the claim diligently—the claim was not barred by the Statute of Limitations only because of the infancy of the claimant and an action upon the claim is now pending.

As to the fourth charge, it was found that, although respondent commenced an action upon the claim in January, 1954, he failed to prosecute the action thereafter for about 14 years; that respondent failed to advise this client of the true status of the matter; and that he made general, elusive and untrue responses to the client's inquiries in 1955, 1957, 1965 and 1967.

In our opinion, these findings were established by the admissions in respondent's answer to the petition and by the proof at the hearing; we therefore confirm the report as to these findings, as requested in petitioner's motion.

It is as to a further finding in connection with the fourth charge that petitioner asks disaffirmance. That finding is that the "failure" of the client (who had moved to Florida in 1954) "to make inquiry of respondent for substantial periods of time contributed in some measure to respondent's neglect in the prosecution of this claim." We are in agreement with petitioner that this finding was not warranted by the record and therefore we disaffirm the report as to it.

Petitioner's motion is granted in all respects. Respondent should be, and he hereby is, suspended from the practice of law for a period of one year, commencing July 20, 1968.

APPELLATE DIVISION'S ORDER OF SUSPENSION, JULY 1, 1968

A disciplinary proceeding having been instituted in this court upon the petition of The Brooklyn Bar Association in respect to Thomas F. Gordon, an attorney and counselor at law, admitted to practice by this court on December 20, 1950; the petition praying that the respondent Thomas F. Gordon be disciplined for professional misconduct upon the charges therein set forth; the said proceeding having come on to be heard by a notice of motion, dated November 10, 1967; the respondent having filed an answer; this court by an order dated December 18, 1967 having referred the issues raised by the pleadings to the Hon. Theodore D. Ostrow; thereafter by amended order of reference dated January 29, 1968, the Hon. Vincent D. Damiani, Justice of the Supreme Court, having been substituted for the Hon. Theodore D. Ostrow (deceased) to hear and to report, with his findings upon each of the issues; thereafter the said Justice having held hearings and having filed his report dated May

6, 1968, together with the testimony and exhibits; and petitioner by notice of motion, dated May 21, 1968, having moved (1) to confirm in part and to disaffirm in part the report of the Justice and (2) for further action with respect to respondent as contemplated by law;

NOW, upon the said petition, verified November 8, 1967, the answer verified December 5, 1967; the typewritten transcript of the stenographic minutes of the hearings; the exhibits; the said report dated May 6, 1968; and the said notice of motion of petitioner and affirmation of Herbert H. Hefler in support of said motion; the affidavit of respondent in opposition thereto; and upon all the papers filed herein, and upon the opinion and decision slip of the court herein, heretofore filed and made a part hereof; and Herbert H. Hefler, Esq., appearing of counsel for petitioner and Edward J. McCann, Esq., appearing of counsel for respondent; and due deliberation having been had thereon; it is:

ORDERED that petitioner's motion to confirm in part and disaffirm in part the report of the Justice is hereby granted; and it is further

ORDERED that the findings of fact made by the Justice as contained in his report are hereby confirmed, except that with respect to the fourth charge the finding to the effect that the client's failure to make inquiry of the respondent contributed to the respondent's neglect, is disaffirmed as set forth in the opinion and decision slip of the court herein; and it is further

ORDERED that respondent THOMAS F. GORDON, is hereby suspended from the practice of the law for a period on one year, commencing July 20, 1968, and continuing until the further order of this court, with leave to apply for reinstatement after the expiration of said period of one year, upon furnishing satisfactory proof: (a) that during said period he has actually refrained from practicing or attempting to practice as an attorney and counselor at law; (b) that he has fully complied with this order and with the

terms and provisions of the written instructions governing the conduct and duties of suspended attorneys, a copy of such instructions being annexed hereto and made a part hereof; and (c) that he has otherwise properly conducted himself; and it is further

ORDERED, pursuant to statute (Judiciary Law, § 90), that the said respondent THOMAS F. GORDON, during the period of such suspension and until the further order of this court, be and he hereby is commanded to desist and refrain: (1) from practicing law in any form, either as principal or agent, clerk or employee of another; (2) from appearing as an attorney or counselor at law before any court, judge, justice, board, commission or other public authority; (3) from giving to another an opinion as to the law or its application, or any advice in relation thereto; and (4) from holding himself out in any way as an attorney or counselor at law.

MINUTES OF HEARING BEFORE REFEREE, APRIL 5, 1968

* * *

Now, on that score, I say that there was a violation of the constitutional right of this respondent to remain silent. As a result of his compliance with the decisional law of this state as existed at that time, he did testify and flowing from that testimony we have this particular complaint, because prior to that time, while it does appear that there were two complaints, they were adjusted as matters of a breach of contract.

* * *

Now, aside from my objections as offered as to Paragraphs 8, 9, 15 and 20 as being violative of the constitutional rights of the respondent, I respectfully ask that your Honor in reporting to the Appellate Division give a judicial finding on the violation of the constitutional rights of the respondent.

As a matter of fact, I think your Honor is very familiar with the Garrity against New Jersey case decided by the Supreme Court within the last year and a half or so, wherein the Court said that the provisions of the Constitution of the United States under the Fifth and Fourteenth amendments as to teachers and lawyers cannot be watered down.

I say that under our own Constitution this respondent, that is under the provisions of Article 1 Section 6 of our own Constitution, and under the Fifth Amendment to the Constitution of the United States, this respondent was, by the action of the bar association and its committee on grievances, deprived of his right to due process of law within this state.

AFFIDAVIT IN SUPPORT OF MOTION FOR REARGUMENT, FILED IN APPELLATE DIVISION ON JULY 16, 1968

* * *

That as part of the petition by paragraphs 8, 9, 15 and 20, the petitioner makes sole reference to the alleged failure of your deponent to respond to requests of the petitioner's Committee on Grievances.

While your deponent's answer did admit the factual statements made in paragraphs 8, 9, 15 and 20 as well as others of the petition, it would appear from the opinion of this Court dated July 1, 1968, that such admissions do redound to the detriment of your deponent, and accordingly did violate his constitutional rights and privileges.

Upon the opening of the hearing before Mr. Justice Damiani on April 5, 1968, your deponent's attorney immediately objected to the proceeding upon the ground that the inclusion of said paragraphs 8, 9, 15 and 20 did violate a fundamental constitutional right of deponent to remain silent (SM 2-9). The reply of counsel for the petitioner to deponent's argument asserted as a matter of law that an attorney must testify. This contention is without merit.

Mr. Justice Damiani, in his report filed in this Court, dated May 8, 1968, on page 4, under the heading "Hearing", referring to the aforementioned issue says, "The undersigned has not passed upon any of these issues in view of the fact that the Order of Reference herein is only to hear and report."

This court in its decision dated July 1, 1968, stated:

"In our opinion, these findings were established by the admissions in Respondent's answer to the petition."

It is clear from the opinion that the judgment of this Court was based upon the admissions in deponent's answer, including paragraphs 8, 9, 15 and 20 of the petition, resulting in deponent being penalized and punished in violation of the fundamental constitutional right and privilege of due process of law.

The issue raised upon the opening of the hearing was as a matter of law referred for judicial determination to this Court (SM 2-6). This Court failed to answer this vital constitutional issue involving the due process afforded to members of the Bar, resulting in an Order of suspension herein being founded upon a violation of a constitutional right.

COURT OF APPEALS' ORDER TO SHOW CAUSE ON MOTION FOR LEAVE TO APPEAL, SEPTEMBER 10, 1968

ORDERED, that the Petitioner show cause before this Court at a session to be held at the Courthouse thereof, in the Court of Appeals Hall, Eagle and Pine Streets, Albany, New York, on the 24th day of September 1968, at 2:00 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, why an ORDER should not be made herein:

(A) Granting leave to the Respondent, THOMAS F. GORDON, to appeal to the Court of Appeals from the said Order of suspension of the Appellate Division, on the grounds:

(1) That the Constitutional rights of the Respondent under the FIFTH and FOURTEENTH Amendments to the Constitution of the United States of America were violated;

(2) That the penalty imposed was excessive and unwarranted under all the facts and circumstances of the case.

(3) That the penalty is vague and indefinite and is violation of due Process of Law;

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In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1145

THOMAS F. GORDON,

Petitioner,

v.

THE BROOKLYN BAR ASSOCIATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1145

THOMAS F. GORDON,

Petitioner,

v.

THE BROOKLYN BAR ASSOCIATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

Preliminary Statement

Petitioner seeks a writ of certiorari to review an order of the Appellate Division, Second Department, of the Supreme Court of the State of New York (hereinafter referred to as "the Appellate Division"), made and entered on July 1st, 1968, suspending petitioner from the practice of law.

Claimed Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under Title 28 U.S.C. 1257(3).

Constitutional And Statutory Provisions Involved

The pertinent constitutional and statutory provisions are set forth in the Appendix to this brief. They are: The Fourth, Fifth and Eighth Amendments and Section 1 of the Fourteenth Amendment to the United States Constitution, New York Judiciary Law, Section 90, subd. 2 and New York Civil Practice Law and Rules, Rule 4403.

The Questions Sought To Be Presented

The petition, at page 2 thereof, seeks to refer three purported questions to this Court.

As will be hereinafter demonstrated, said questions so stated are either not founded on any factual basis to be found in the record, or for the other reasons ascribed in this brief, same do not present any Federal questions for this honorable Court's determination.

Respondent's Exception To Statement Of Case In Petition

In order not to render this brief unduly prolix, but without conceding the accuracy of the "Statement of Case" set forth in the petition herein, it is respectfully submitted that various inaccuracies therein or omissions therefrom are pointed out in the Points below for the purposes of this brief.

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED

POINT I

This case is in no respect comparable to *Spevack* v. *Klein*. Petitioner was not disciplined for any failure to cooperate with the grievance committee, his admissions to the committee were voluntary, and the disciplinary proceeding result was amply supported by the proof at the hearing before the Referee and by voluntary and untainted admissions by petitioner's answer.

The first question sought to be raised by the petition to this Court is stated as follows:

> "1. Whether the Fifth Amendment privilege against self-incrimination, as applied to state action through the Fourteenth Amendment, precludes an attorney's failure to provide information to the Grievance Committee of a bar association in its investigation of complaints against him from being made the basis of disciplinary charges against the attorney." (Pet.*, p. 2)

It would therefore appear that the petitioner seeks to apply the doctrine of *Spevack* v. *Klein*, 385 U. S. 511, to this case. Later, in the petition herein, under the heading "REASONS FOR GRANTING THE WRIT", this purported question became transmuted into a claim that petitioner's Constitutional rights were allegedly violated in that:

> ". . . (2) The use in the disciplinary proceeding of admissions made by petitioner under threat of disbarment constitutes a violation of the Fourth and Fifth Amendments." (Pet., p. 7)

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* References herein to "Pet." refer to the petition herein for writ of certiorari.

There is no factual or other basis in this case for either the question or the claim of alleged violation of Constitutional rights.

a.

The Appellate Division did not discipline petitioner for failure to cooperate with the respondent's Grievance Committee (hereinafter referred to as "the grievance committee"). The petitioner was disciplined for neglecting his clients' interests in all four of the matters under complaint; for failing to advise his clients of the true status of their claims in three of the matters under complaint; for making general, elusive and untrue responses to the clients' inquiries in three of the matters under complaint and for failing to respond to repeated inquiries by the client in the fourth matter. At no point in the Referee's report (OP* Item 5) or in the decision or order of suspension of the Appellate Division (OP Item Group 6), or in any other Court decision or order was there the remotest reference to any failure on petitioner's part to cooperate with the grievance committee. This clearly appears from the petition itself, which contains in the appendix thereto (Pet., pp. 19, 20) a copy of the body of the Appellate Division's decision.

This is the fact notwithstanding the assertion in the petition herein that

> ". . . The decision of the Appellate Division dated July 1, 1968, contained the statement with respect to the findings of the referee that 'these findings were established by the admissions in respondent's [petitioner's] answer to the petition'. The decision of the Appellate Division thus relied in part upon petitioner's admissions with respect to the allegations in the peti-

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* References herein preceded by the symbol "OP" refer to the original papers transmitted to this Court by the Appellate Division and itemized in the schedule furnished therewith.

> tion that he failed to furnish information to the Committee on Grievances." (Pet., p. 5)

Parenthetically, it will be noted that in two of the four matters complained of, the respondent's petition in the disciplinary proceeding (hereinafter referred to as "the Bar Association petition") shows that, contrary to the view of the petitioner herein, petitioner ultimately did cooperate with the grievance committee and in a third case was not even called upon for any cooperation (Bar Association petition, pp. 2, 6, 7—OP Item group 1).

b.

It is self-evident from a reading of the transcript of the disciplinary proceeding hearing before the Referee (said hearing being hereinafter referred to as "the Referee's hearing") that the petitioner was not called to testify at the Referee's hearing, that he did not testify thereat and that no attempt was even made to introduce any transcripts of prior testimony by petitioner before the grievance committee (Transcript,* pp. 1-132—OP Item 3). Consequently there cannot be, and there is not any claim in any part of the record that such was the case.

In his affidavit in opposition to the motion to confirm, in part, and disaffirm, in part, the Referee's report in the disciplinary proceeding (such motion being hereinafter referred to as "the motion on the Referee's report"), petitioner gave as his reason for not testifying at the Referee's hearing that

> "The actions involved in this proceeding had their origin in 1953, 1955, 1961 and 1962, and in view of the admissions contained in your deponent's answer, as aforesaid, and the fact that your deponent was

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* References herein to "Transcript" are to the transcript of the Referee's hearing.

unable to recall the particular content of any conversation had with his client over the span of years, accordingly deponent deemed it proper that he not testify at the hearing." (Affidavit dated June 4, 1968 —OP Item group 6)

c.

In the petition herein the words or phrases (or variations thereof) "threat of disbarment",* "coercion"** and "compulsion"*** were employed to describe or refer to testimony or admissions or production of records**** to the extent that it would seem to appear that the record shows that petitioner's admissions to the grievance committee were brought about by "threat of disbarment", "coercion" or "compulsion".

However the record fails to reveal any evidence that petitioner was ever threatened with disbarment or other discipline, or was under compulsion or coercion when he made the admissions to the grievance committee alleged in the Bar Association petition. There is no such evidence because it is not the fact.

The sole indication, however remote, of any causative reason for any appearance by petitioner before the grievance committee to be found in the record is with respect to the Kennedy complaint. On the Referee's hearing, petitioner's then counsel conceded (Transcript, p. 12) that petitioner was requested, not subpoenaed, to appear before the grievance committee. Such appearance must therefor be deemed to have been voluntary, particularly since it occurred on July 19, 1967, months after the deci-

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* Petition herein, at pp. 7, 9, 10, 11 and '.

** Petition herein, at pp. 6, 10 (three times), 11 (two times) and 14.

*** Petition herein, at pp. 4, 11 (five times), 12 and 14 (four times).

**** Records are not an issue herein (see pp. 10, 11 of this brief).

sion of this Court in *Spevack* v. *Klein*, 385 U. S. 511 (Bar Association petition, p. 6). Without any particular reference, the petition herein recites that "Petitioner . . . complied with a request by the Grievance Committee for information" (Pet., p. 9).

d.

Petitioner never invoked a Fifth Amendment privilege at any of the times he made the admissions to the grievance committee alleged in the Bar Association petition. Such admissions were therefor properly employed in the Bar Association petition.

e.

There being no basis for any claim that petitioner's admissions were brought on by "threat of disbarment", or "coercion" or "compulsion", petitioner falls back at one place in his petition herein on the phrase "implied threat of disbarment", apparently relying on *Cohen* v. *Hurley*, 366 U. S. 177, in justification (Pet., p. 9).

As has been seen, petitioner never invoked any Fifth Amendment privilege when making his admissions to the grievance committee and he did not raise any claim of privilege by his answer. The admissions are, accordingly, untainted. *Matter of Robert R. Kaufman*, 25 A. D. 2d 48, motion for leave to appeal denied 18 N. Y. 2d 718, cert. denied 389 U. S. 1048, sub nom. *Kaufman* v. *Association of Bar of City of New York*; *Curry* v. *Florida Bar*, 211 So. 2d 169, cert. denied 393 U. S. 981; *Matter of Sgarlato*, 27 A. D. 2d 738, affirmed 22 N. Y. 2d 813, cert. denied 393 U. S. 968, *sub nom. Sgarlato* v. *Klein*.

Coupling the assertion of an "implied threat of disbarment" with the *Cohen* v. *Hurley* decision of this Court, the best view that can be afforded to the claim now being apparently asserted is that petitioner contends that voluntary disclosures which were made by him to the grievance com-

mittee and were later alleged in the Bar Association petition were induced by a fear of disbarment under *Cohen* v. *Hurley* and therefore tainted.

The pattern of such argument is that which was made in several cases recently presented to this Court, in which certiorari was denied. *Matter of Zuckerman,* 20 N. Y. 2d 430, cert. denied 390 U. S. 925 *sub nom. Zuckerman* v. *Greason,* rehearing denied 390 U. S. 975; *Matter of Klebanoff,* 27 A. D. 2d 332, affirmed 21 N. Y. 2d 920, cert. denied 393 U. S. 840 *sub nom. Klebanoff* v. *Coordinating Committee on Discipline;* see also *Matter of Sgarlato,* 27 A. D. 2d 738, affirmed 22 N. Y. 2d 813, cert. denied 393 U. S. 968 *sub nom. Sgarlato* v. *Klein.*

It is pertinent here to quote from the New York Court of Appeals decision in the aforementioned *Matter of Zuckerman,* 20 N. Y. 2d 430, which held (at p. 439) that attorneys

> ". . . are not required to invoke the Fifth Amendment to the Constitution of the United States but may choose to reveal their professional conduct to the scrutiny and evaluation of the Appellate Division when its propriety is drawn in question. To determine whether they have been motivated in doing so by the holding in *Cohen* v. *Hurley* prior to the decision in *Spevack* v. *Klein* or by other reasons would be a speculative inquiry, incapable of and unsuitable to being resolved as a question of fact."

f.

In the State Courts below, as in the petition herein, petitioner, quoting out of context, asserted and still asserts that:

> ". . . The decision of the Appellate Division dated July 1, 1968, contained the statement with respect to the findings of the referee that 'these findings were established by the admissions in respondent's [petitioner's] answer to the petition'." (Pet., p. 5)

See also: affidavit dated July 16, 1968 (p. 2—OP Item group 8).

Actually, what the Appellate Division's decision stated was that:

> "In our opinion, these findings were established by the admissions in respondent's* answer to the petition and by the proof at the hearing; . . ." (Appellate Division decision—OP Item group 6)

Indeed, the full context is included in the Appendix to the petition herein, at page 20.

With respect to such admissions as were relied upon by the Appellate Division as part of the case against the petitioner, it was clearly not a deprivation of any Constitutional right or safeguard when the Appellate Division relied on admissions in the disciplinary proceeding, including admissions arising because petitioner declined to deny by his answer allegations of the Bar Association petition. *Matter of William Robert Klein,* 23 A. D. 2d 356, affirmed 18 N. Y. 2d 598, cert. denied 385 U. S. 973 *sub nom. Klein* v. *Klein,* rehearing denied 385 U. S. 1032, second pet. for rehearing denied 388 U. S. 925.

It is undisputed that under New York practice, allegations in the Bar Association petition undenied by the answer were deemed admitted as a matter of law. This is recognized by the petition herein (Pet., pp. 3, 7).

Further, the admission of such undenied allegations of the Bar Association petition (see Bar Association petition and answer of the petitioner herein—OP Item group 1) was confirmed by counsel who represented petitioner on the Referee's hearing (Transcript, pp 14-17) and was thereafter again acknowledged in various documents submitted

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* Petitioner herein.

by petitioner. For example, in his affidavit in opposition to the motion on the Referee's report, petitioner averred that:

> "Deponent, in answering the said Petition, admitted the allegations in twenty-one of said paragraphs. The only complete denial to all of the allegations in any paragraph was that numbered 5 . . ." (Affidavit dated June 4, 1968—Item group 6)

A reading of the record will show that, in addition to admissions, adequate and legally sufficient independent evidence was adduced in support of the allegations of the Bar Association petition on the Ahern complaint (Transcript, pp. 36-57), the Amontjelis (Paradiso) complaint (Transcript, pp. 20-35; Petitioner's* Exhibit 3—Item group 4) and the Lanzillota complaint (Transcript, pp. 73-104, 109-114; Petitioner's* Exhibits 7, 8, 9—OP Item group 4). There was no testimony in support of the Kennedy complaint only because all of the allegations of the Bar Association petition with respect thereto had been admitted by the answer and were recognized to have been so admitted (Transcript, pp. 16, 17, 59).

8.

Petitioner, for the first time, makes a claim, ostensibly invoking a Fourth Amendment safeguard, in the petition herein. No such claim was made or asserted in any of the Courts below. This is conceded in the petition herein (Pet., p. 14 footnote).

It is elemental that a Constitutional claim should not be considered if raised for the first time in a petition to this Court for a writ of certiorari. *Worthy* v. *Moore County,*

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* Respondent herein.

76 U. S. 611; *Spies* v. *Illinois,* 123 U. S. 131; *Brooks* v. *Missouri,* 124 U. S. 394; *Rogers* v. *Clark Iron Co.,* 217 U. S. 589.

As a matter of fact, with respect to physical evidence, there is no mention in the record of any use by respondent herein of books, records or papers belonging to or in the possession of the petitioner at any time prior to or during the course of the disciplinary proceeding. The only documents of such nature were introduced voluntarily by the then counsel for the petitioner herein and then only in behalf of the petitioner herein, who now seeks to raise a Fourth Amendment privilege not available to him (Respondent's* Exhibits A through E, G, H—OP Item group 4).

POINT II

There has been no violation of the doctrine of *Griffin* v. *California* in this case.

The second question sought to be presented to this Court by the petition herein is stated as follows:

> "2. Whether the Fifth Amendment privilege against self-incrimination, as applied to state action through the Fourteenth Amendment, precludes adverse factual inferences to be drawn from an attorney's failure to testify in disciplinary proceedings against him."

Apparently, petitioner by this purported question seeks to apply the doctrine of *Griffin* v. *California,* 380 U. S. 609, to this case, which bears no resemblance to the *Griffin* v. *California* case and bears no relationship to the doctrine enunciated in that decision.

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* Petitioner herein.

In *Griffin* v. *California,* it was held by this Court that in a criminal case,* the prosecutor may not comment on the accused's silence and the Court may not instruct the jury, the decider of the facts, that such silence is evidence of guilt.

In this case, it is now urged by petitioner that the inclusion in the Referee's report of the objective statement that

> "Respondent [petitioner] did not testify at the hearing." (Pet., p. 5)

violates the doctrine of *Griffin* v. *California.*

Petitioner ignores the fact that in *Griffin* v. *California,* 380 U.S. 609, at page 614, this Court recognized that what the decider of the facts, the jury, infers from the silence of the accused is up to the jury. In this case the Appellate Division (in part through the medium of a Justice of the Supreme Court of the State of New York whom it had appointed to hear the facts in issue and to report back to it thereon) was the decider of the facts.** The Referee in this case was, in effect, an extension of the Appellate Division itself, appointed to assist the Appellate Division in gathering the facts. *Austin* v. *Ahearne,* 61 N. Y. 6; *Barnum* v *Goes,* 240 A. D. 803.

Nothing appears in the decision or order of suspension of the Appellate Division (OP Item group 6) that conveys in any sense or respect the impression that said Court attached any significance whatever to petitioner's silence at the Referee's hearing.

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* Which the case herein is not conceded to be. *Ex parte Wall,* 108 U. S. 265; *Cf. In re Ruffalo,* 390 U. S. 544 for reference to disciplinary proceedings as "quasi-criminal" for purposes of the necessity for adequate notice of charges against the attorney to satisfy due process requirements.

** See New York CPLR Rule 4403 (Appendix hereto, p. A2).

POINT III

Petitioner has not been deprived of due process in that (a) double jeopardy is not involved in this case, and, moreover, petitioner was not twice put in jeopardy, (b) the discipline imposed on petitioner is entirely reasonable and certainly not a "cruel and unusual punishment".

The third question sought to be raised by the petition herein is stated as follows:

> "3. Whether the due process clause of the Fourteenth Amendment is violated by basing charges in a disciplinary proceeding on matters which had previously been considered and dismissed by the grievance committee of the bar association, 'an arm of the Appellate Division,' and by imposing a sanction destructive of an attorney's practice on the basis of conduct which involved no intentional wrongdoing and resulted in no injury to any client." (Pet., p. 2)

It would appear that the assertion being made by this question is two-fold. Precisely what the two facets of this purported question really import requires extensive search in the petition.

a.

To determine what was intended by the claim that the due process clause of the Fourteenth Amendment was allegedly violated by "basing charges in a disciplinary proceeding on matters which had previously been considered and dismissed by the grievance committee", we find at page 16 of the petition that the argument is that "(e)lementary fairness, resting on double jeopardy concepts embodied in our fundamental law, would seem to preclude matters which have already been adjudicated by 'an arm of the Appellate Division' from being the subject of subse-

quent disciplinary proceedings by the Appellate Division". [It will be noted that what the grievance committee is claimed to have done was changed from "considered" in the original question to "adjudicated" in the argument (see further use of "adjudicated", at Pet., pp. 4, 6).]

We are compelled to assume that petitioner's stance is that protection against double jeopardy under the Constitution protects him in this case. Petitioner raises this alleged claim only with respect to two of the four matters under complaint (Pet., pp. 4, 6, 15, 16).

As has hereinbefore been noted, it is not conceded that the disciplinary proceeding herein is a criminal case (footnote, p. 12 hereof). However, even assuming, *arguendo* (but without thereby conceding), that this case were to be deemed a criminal case for purposes of "double jeopardy concepts", there has been no double jeopardy in this case and petitioner was not twice put in jeopardy, for the reasons stated below.

By virtue of New York Judiciary Law, Section 90, subd. 2, the sole body that has the authority to adjudicate complaints of wrongdoing against an attorney and to impose discipline on an attorney is an Appellate Division of the Supreme Court of the State of New York (See appendix hereto, p. A2).

No authority or power to impose discipline is vested in any Bar Association grievance committee. The sole function of the grievance committee is to receive and inquire into charges against an attorney and, if the grievance committee satisfies itself that the facts warrant it, to present such charges to the Appellate Division, for adjudication and for such action in respect of the attorney as the Appellate Division may deem warranted, after adjudication. *In re Dolphin,* 240 N. Y. 89; *Wiener* v. *Weintraub,* 22 N. Y. 2d 330. In the last cited decision, the New York Court of Appeals held that in investigating complaints and in satis-

fying itself as to whether or not the charges asserted against an attorney should be brought to the attention of the Appellate Division, a grievance committee acts as "an arm of the Appellate Division" and the investigation or preliminary proceeding is "quasi-judicial" in nature, thus affording a privilege against libel action to a complainant against an attorney.

If we then consider, as we must, that a grievance committee conducts a preliminary inquiry with respect to a disciplinary proceeding, it is quite analogous to a grand jury, which conducts a preliminary inquiry with respect to a criminal case, for it is a grand jury's function to determine whether or not charges against a prospective defendant shall be returned in an indictment.

Clearly, there is no impediment under the New York Constitution or statutes to the action taken against the petitioner herein in the disciplinary proceeding in the Courts below. Is there any Federal Constitutional impediment to such action? It is respectfully submitted that there is not.

It has been held that a grievance committee's acts are "quasi-judicial" and constitute a preliminary or "first instance" inquiry. *Doe* v. *Rosenberry,* 225 F. 2d 118. Comparably, a proceeding before a grand jury has been held to be a "judicial inquiry". *Cobbledick* v. *United States,* 309 U. S. 323. Comparable to a grievance committee, a grand jury has been held to be an "arm of the court", *Marcus* v. *United States,* 310 F. 2d 143, 146; *In re Lazarus,* 276 F. Supp. 434, or an "appendage of the court". *Brown* v. *United States,* 359 U. S. 41, 49.

In this case, prior grievance committees had not brought the derelictions of the petitioner in the Ahern and Amontjelis (Paradiso) matters to the attention of the Appellate Division. Upon being satisfied of continued wrongdoing by petitioner, a subsequent grievance committee decided that

said matters be called to the attention of the Appellate Division together with subsequent wrongdoing (Bar Association petition, p. 2—OP Item 1).

At common law and under the Federal rule, the failure of a grand jury to indict does not operate as a bar to prosecution. A subsequent grand jury can find an indictment on the same set of facts a prior grand jury refused to indict on. *Alexander* v. *United States,* 95 F. 2d 873, cert. denied 305 U. S. 637. Even where there is a court order dismissing a count of an indictment, this would not constitute an adjudication of a fact which would preclude the filing of a superseding indictment on that count. *United States* v. *Root,* 366 F. 2d 377, cert. denied 386 U. S. 912; *United States* v. *James,* 290 F. 2d 866, cert. denied 368 U. S. 834.

Jeopardy could not have attached in this case in any preliminary investigation or inquiry by the grievance committee for the same reasons that jeopardy would not attach at any preliminary inquiry or hearing. Jeopardy could only attach upon the swearing of a jury. *Downum* v. *United States,* 372 U. S. 734, or when a Court, sitting without a jury, has begun to hear evidence. *Hunter* v. *Wade,* 169 F. 2d 973, affirmed 336 U. S. 684. Applying the same principles to this case, although still not conceding this to be a criminal case, the conclusion must necessarily be reached that no jeopardy attached (if any attached at all in a disciplinary proceeding) in this case, before the Referee began to hear evidence at the Referee's hearing.

b.

Contrary to petitioner's repeated assertions that the Ahern and Amontjelis (Paradiso) complaints were flatly "dismissed" (Pet., pp. 2, 4, 7, 15, 16), the grievance committee, although not then presenting the charges in the Ahern and Amontjelis (Paradiso) complaints to the Appellate Division, admonished the petitioner herein in each

such case (Bar Association petition, pp. 3-5—OP Item group 1). Clearly such "dismissals" were not adjudications, for only the Appellate Division had such power or authority. New York Judiciary Law, Section 90, subd. 2. They were the equivalent of a failure of a grand jury to indict, not barring a subsequent charge on the same facts.

The procedure followed in this case reflects a reluctance on the part of grievance committees to present initial charges to the Appellate Division, where there appears hope that the attorney will mend his ways. Where, as in this case, the attorney chooses not to do so, not only is the public harmed, but subsequent charges demonstrate the need for appropriate action by the Appellate Division. Thus, it became necessary for the Appellate Division, First Department, to hold in *In Re Levy,* 19 A. D. 2d 505, that

> "Similar charges brought an admonishment by the Grievance Committee . . . in 1959 . . .
>
> "In view of respondent's demonstrated inability to rectify his conduct in spite of the 1959 warning and in order to protect the public, disciplinary action is indicated . . ."

In the case at bar, the petitioner, having been afforded the opportunity to rectify his conduct, has demonstrated his inability or refusal to do so.

c.

Under the second facet of the third purported question, petitioner claims that the suspension imposed upon him is so severe as to constitute a violation of the due process clause of the Fourteenth Amendment (Pet., pp. 16-18).

On his motion for reargument in the Appellate Division, petitioner asserted that "(t)he punishment is disproportionate to the alleged gravity of the offense and does constitute cruel and inhuman treatment".* Viewed from this

* So in original.

context, it would appear that petitioner relied, at least at that time, in part on the Eighth Amendment, as same might be applicable to the States under the Fourteenth Amendment. In the petition herein there is no reference to "cruel and inhuman treatment" (possibly intended to refer to "cruel and unusual punishment"). The reference now is to "fundamental fairness" and an assertion that the discipline imposed in this case, which petitioner categorizes as "severe" (Pet., pp. 17, 18) or as "extreme" (Pet., pp. 17, 18), constituted a denial of due process because it is "unduly offensive to the sense of fairness inherent in our traditional concepts of liberty and respect for individual rights" or that it "shocks the common understanding of decency and fair play" (Pet., p. 17).

Petitioner blithely urges that "there was no deliberate wrongdoing" on his part (Pet., p. 17), but that the suspension was imposed although based on "findings that he had been neglectful in handling four matters in which he had been retained and that he had been less than frank in disclosing the status of some of these matters upon inquiry" (Pet., p. 15). He also asserts that in two of the cases he paid his clients "the value of their claim" (Pet., p. 15).

These statements are in contrast to the findings and the record. Petitioner concedes that he was neglectful in all four matters under complaint. The findings and record show that in the Ahern and Amontjelis (Paradiso) matters, petitioner never commenced the actions that he had been retained to commence, with the result that same were barred by the Statute of Limitations. He was found to have settled with these clients. There is no indication of what the full "value of their claim" would have been. In the Kennedy matter, petitioner was retained in 1961 in behalf of an injured infant. As of the time of the client's complaint in 1967, petitioner had not commenced any action and the Statute of Limitations had not expired only because

of the infancy of the injured party. In the Lanzilotta matter, petitioner had commenced an action in 1954, but had failed to prosecute same for about 14 years thereafter.

Beyond conceding his negligence, petitioner seeks to ignore the further findings of the Appellate Division that with respect to the first two matters under complaint petitioner "failed to advise the clients of the true status of their claims; and made general, elusive and untrue responses to the clients' inquiries", that with respect to a third matter petitioner "failed to respond to repeated inquiries by the child's father (who had retained . . ." petitioner), and that in the fourth matter petitioner "failed to advise the client of the true status of the matter; and that he made general, elusive and untrue responses to the client's inquiries in 1955, 1957, 1965 and 1967" (See decision of Appellate Division—Op Item group 6). Petitioner is hardly presented in the findings as an unfortunate innocent.

In any event, it is within the sole province of the Appellate Division, absent an abuse of its authority, to determine the discipline to be imposed upon an attorney. *Erie County Water Authority* v. *Western New York Water Co.*, 304 N. Y. 342, cert. denied 344 U. S. 892; *In re Axtell*, 257 N. Y. 210. The discipline imposed on the petitioner is clearly in line with comparable disciplines imposed by Appellate Divisions. For neglecting to prosecute claims for which he had been retained and for misrepresenting the pendency of negotiations thereunder, an attorney was suspended for two years in view of previous charges and his admonishment by a grievance committee. *In re Levy*, 19 A. D. 2d 505. An attorney deceiving his client as to the progress of an action was suspended for two years. *In re Babcock*, 230 A. D. 323. It has also been held that neglect of a client's cause warranted suspension for as long as two years. *In re Sultan*, 26 A. D. 2d 210.

Under New York Judiciary Law, Section 90, subd. 2, the Appellate Division can disbar, suspend or censure. Most

certainly a one-year suspension was not a "cruel and unusual punishment" as contemplated by the Eighth Amendment and cannot be deemed to be so fundamentally unfair as to constitute a violation of due process under the Fourteenth Amendment or to "shock the common understanding of decency and fair play". Under the circumstances of this case, it is respectfully submitted that the discipline to which the petitioner is subjected is reasonable and not an abuse of authority.

d.

Petitioner complains that the order of suspension may require suspension for "considerably more than a year". However, this ignores the fact that the attorney may move for reinstatement at any time "after the expiration of one year" and the order specifically grants him leave to do so (See order of suspension—OP Item group 6). The provisions in said order, requiring satisfactory proof, for reinstatement, of compliance with the order is usual in such suspension orders. See *Matter of Sgarlato*, 27 A. D. 2d 738, affirmed 22 N. Y. 2d 813, cert. denied 393 U. S. 968, *sub nom. Sgarlato* v. *Klein* as an example thereof. The order is clear and unambiguous and should not present any hurdle for an attorney who has been suspended, has complied with the order of suspension and desires to practice again.

Petitioner further complains that, in his view, the suspension will destroy his negligence practice. This, of course, is pure conjecture on his part. From his standpoint a one-month suspension would similarly destroy his practice. What he apparently seems to say is that there should not be any suspensions—just disbarments or censures. It is respectfully submitted that such limitation on the discipline to be imposed on errant attorneys is not realistic either for the Courts administering discipline or for the attorneys under discipline.

POINT IV

No constitutional question is involved in this case and, in any event, there is adequate nonfederal ground on which to sustain the decision and order below.

On the basis of all of the foregoing, it is clear that not only have petitioner's Constitutional rights not been violated, but that there is more than adequate nonfederal ground on which the Appellate Division decision and order were based. Certiorari should be denied accordingly. *Murdock* v. *City of Memphis,* 20 Wall 590; *Herb* v. *Pitcairn,* 324 U. S. 117.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Fourth Amendment, United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Eighth Amendment, United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

New York Judiciary Law, Section 90

* * * * *

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice . . .

* * * * *

New York Civil Practice Law and Rules, Rule 4403

Upon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part, the verdict of an advisory jury or the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing . . . Where no issues remain to be tried the court shall render decision directing judgment in the action.